APR 22 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1581

EKBERG SHIPPING CORP.,

Petitioner,

—against—

ELENA JEREZANO MONCADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM M. KIMBALL
Counsel for Petitioner
25 Broadway
New York, New York 10004

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	11
Appendix A	
Opinion of Court of Appeals	1a
Appendix B	
Judgment of Court of Appeals	6a

Table of Cases

Afroyim v. Rusk, 387 U.S. 253 (1967)	11
Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437 (2 Cir. 1959), cert. denied 359 U.S. 1000 (1959)	5, 6
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957)	8
Bobolakis v. Compania Panamena Maritima San Gerassimo, 168 F. Supp. 236 (S.D.N.Y. 1958)	6

PAGE

Gambera v. Bergoty, 132 F. 2d 414 (2 Cir. 1942) 5, 6
Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 11

Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970) 4, 6, 7, 8, 11

Lauritzen v. Larsen, 345 U.S. 571 (1953) 4, 5, 7, 8
Lopes v. S.S. Ocean Daphne, 337 F. 2d 777 (4 Cir. 1964) 7

Marchetti v. United States, 390 U.S. 39 (1968) 11
McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963) 8

U.S. v. General Motors Corp., 323 U.S. 373 (1945) 11

Windward Shipping (London) Ltd. v. American Radio Ass'n, —— U.S. ——, 42 LW 4234 (2/19/74) 7-8, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

EKBERG SHIPPING CORP.,

Petitioner,

—against—

ELENA JEREZANO MONCADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on January 21, 1974.

Opinions Below

The opinion of the Court of Appeals, printed in Appendix A hereto, is reported in 491 F. 2d 470. The unreported oral decision of the District Court is printed in the Joint Appendix below (52a-54a).

Jurisdiction

The judgment of the Court of Appeals dated January 21, 1974 was entered January 21, 1974 and is printed in Appendix B hereto. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Should extra-territorial application of the Jones Act hinge on the substantiality of the seaman's U.S.A. contacts, or the substantiality of the employer's U.S.A. contacts?

Statute Involved

The Jones Act, 46 U.S.C. 688, reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

Statement

Respondent widow sued petitioner shipowner under the Jones Act for negligently causing her seaman husband's death.*

Decedent, who had no U.S.A. contacts (33a), was a native born Honduran citizen and resident (26a). He was a member of an Honduran seamen's union with which petitioner had an agreement that Honduran seamen in its employ and their dependents would be compensated under Honduran law for injury or death (27a, 34a, 46a-47a).

Petitioner employed decedent as a seaman on the S.S. EKBERG from June 12, 1968 until September 27, 1968 (28a, 40a). He signed on at Balboa, Panama (71a) and died aboard ship at Maceio, Brazil (109a).

Petitioner was incorporated in Liberia (24a) to buy from Panamanian owners a Panamanian ship HILDA LEE, which was renamed EKBERG and transferred to Liberian flag and registry (42a). From May 1967 until November 1968, when the ship was sold (42a, 45a), petitioner owned the EKBERG (21a) and employed her crew of Spanish officers and majority Honduran seamen (43a-44a).

S.S. EKBERG was bought primarily for spot tramping (i.e., short voyage charters) in the Caribbean (42a), which is all the ship did during decedent's employ (39a). The EKBERG traded exclusively in the Caribbean while owned by petitioner, with approximately 40% of the voyages either to or from some U.S. port and the remaining 60% entirely foreign (25a). During the 3½ months decedent was a crew-

* The widow also sued petitioner for unseaworthiness, and sued two co-defendants for negligence and unseaworthiness. The question presented is unaffected by the disposition of those other claims.

member, S.S. EKBERG called at only two U.S. ports during a single voyage two months before he died (28a-29a). Two days before he died, the ship arrived in ballast at Maceio to load sugar en route from Santos, Salvador where she had discharged cement loaded at Puerto La Cruz, Nicaragua (29a, 75a, 92a).

A New York corporation managed and operated S.S. EKBERG from New York as agent for petitioner, and another New York corporation brokered the spot chartering (39a-41a, 48a). All corporate officers and stockholders of petitioner, the operating agent, and the chartering broker are U.S. citizens (23a).

The District Court dismissed the widow's Jones Act claim against petitioner because of insufficient U.S. contacts (54a). The Court of Appeals reversed and remanded for a new trial on the ground that U.S. stock ownership, U.S. corporate officers, U.S. operations base, and 40% voyages to or from U.S. ports were sufficiently substantial contacts to establish Jones Act jurisdiction.

Reasons for Granting the Writ

There is a "problem of statutory construction". *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953). Should extraterritorial applicability depend on whether decedent was a Jones Act "seaman", or whether petitioner was a Jones Act "employer", or both.

In *Hellenic Lines* v. *Rhoditis*, 398 U.S. 306, 310 (1970), the majority opinion by Mr. Justice Douglas decided "the Court of Appeals was clearly right in holding that petitioner Hellenic Lines was an 'employer' under the Jones Act." The dissenters, in an opinion by Mr. Justice Harlan,

thought the criterion should be whether "the injured seaman is an individual whose well-being is a concern of this country." 398 U.S., 314. The majority, conceiving a "national interest served by the assertion of Jones Act jurisdiction", 398 U.S., 309, saw "no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibilities of a Jones Act 'employer'." 398 U.S., 310. The dissenters thought "the underlying concern of the legislation before us is the adjustment of the risk of [personal injury] loss between individuals and not the regulation of commerce or competition", 398 U.S., 317, and that "Where, as in the case before us, the injured plaintiff has no American ties, the inquiry should be directed toward determining what jurisdiction is primarily concerned with plaintiff's welfare", 398 U.S., 318.

As Mr. Justice Jackson observed in *Lauritzen,* 345 U.S., 577, "Congress in 1920 wrote these all-comprehending words ['any seaman'], not on a clean slate, but as a postscript to a long series of enactments governing shipping." "The history of the statute before us begins with the 1915 enactment of the comprehensive La Follette Act * * 38 Stat. 1164." 345 U.S., 579. Although the Jones Act history itself, "is of little help * [having] * passed through both Houses of Congress without debate, and without discussion in committee reports", *Bartholomew* v. *Universe Tankships, Inc.,* 263 F. 2d 437, 450 (2 Cir. 1959), cert. denied 359 U.S. 1000 (1959), the 1915 statute is entitled "An Act To promote the welfare of American seamen in the merchant marine of the United States", *Lauritzen,* 345 U.S., 579. As Judge Learned Hand noted in *Gambera* v. *Bergoty,* 132 F. 2d 414, 416 (2 Cir. 1942), "The Jones Act was the

culmination of a series of efforts * * to secure more adequate relief for American seamen, injured in their employment."

The court below relied on *Rhoditis* and on its own dictum in *Bartholomew*. In both cases, the material facts are distinguishable. In *Rhoditis*, the seaman "was injured in the Port of New Orleans, Louisiana, aboard a vessel regularly engaged in a scheduled trade to and from the United States Gulf ports", 273 F. Supp., 249, and the majority opinion iterated and relied on the facts that "The injury occurred here. * * The *Hellenic Hero* was not a casual visitor; rather, it and many of its sister ships were earning income from cargo originating or terminating here." 398 U.S., 310. In *Bartholomew*, as Mr. Justice Harlan distinguished in *Rhoditis*, 398 U.S., 316-7, fn. 4, "plaintiff was an American domiciliary" who, as Judge Hand established in *Gambera*, 132 F. 2d, 416, was thereby an American seaman for Jones Act purposes. Also, since defendant brought Bartholomew to the United States two years before to sail on defendant's ships, 263 F. 2d, 441, the vessel was most probably in U.S. liner service.

The court below also relied on *Bobolakis* v. *Compania Panamena Maritima San Gerassimo*, 168 F. Supp. 236 (S.D. N.Y. 1958), which held that U.S. ownership and control of the foreign corporate owner of a foreign flag ship warranted application of the Jones Act, otherwise "an American owner might escape his statutory liability merely by interposing a foreign corporation between himself and the vessel, both of which, for all practical purposes, he owns", 168 F. Supp., 238. The circuitous rationale begs the question of whether Congress intended the American owner of a foreign flag ship to have any Jones Act liability. "As an economic matter there seems little to distinguish this phe-

nomenon from other movements of American capital abroad in search for cost reductions." Note, 60 Col. L. Rev. 711.

Except for assumed legislative acquiescence to self-serving judicial assertions, there is no indication that Congress intended the Jones Act to be used "as a means of benefiting seamen [by] enhancing the costs of foreign ship operation for the competitive advantage of our own." *Lauritzen*, 345 U.S., 593. Aside from considerable doubt that no Jones Act liability "is a significant contribution to the competitive advantage of foreign-flag ships" • [or that] • "Jones Act liability [is] a significant uncompensated cost in the operation of an American ship", *Rhoditis*, 398 U.S., 317, the Act was passed 20 years before the advent of flags of convenience/necessity and "In this historical context, the dichotomy between U.S. and foreign vessels then before Congress did not involve the category of U.S. owned-foreign registered vessels." *Lopes* v. *S.S. Ocean Daphne*, 337 F. 2d 777, 779 (4 Cir. 1964).

Apart from incompatibility with *Lauritzen*'s motivating concern for "reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations • • under prevalent doctrines of international law", 345 U.S., 577, punitive application of the Jones Act to regulate international commerce and foreign competition is inconsistent with related decisions of the Court and is at cross-purposes with actions by Congress and the Executive.

An infinitely more effective way to equalize competition between American and foreign vessels engaged in U.S. commerce would be to permit our unions to Americanize the wages and working benefits of foreign crews. But, as the majority reaffirmed in *Windward Shipping (London)*

Ltd. v. *American Radio Ass'n,* —— U.S. ——, 42 LW 4234 (2/19/74), for the past 17 years the Court has repeatedly held that the Labor Management Relations Act does not countenance American union action against foreign ships manned by alien crews, quoting, *inter alia, Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957), and *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10 (1963). "Studying the legislative history of the Act, the Court found no indication that it was intended to govern disputes between foreign ship owners and foreign crews. On the contrary, the Court concluded that the most revealing legislative history strongly suggested the bill was a 'bill of rights . . . for *American* workingmen and their employers.' 353 U.S., at 144. (Emphasis in original.) The Court stated that this history 'inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions.' *Id.,* at 144." 42 LW, 4236. Although Congress undeniably has the power, 372 U.S., 17, and the literal statutory language is broad enough, 372 U.S., 19, "We therefore conclude, as we did in *Benz,* that for us to sanction the exercise of local sovereignty under such conditions in this 'delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed'." *McCulloch,* 372 U.S., 21-22. Congress "simply did not intend that Act to erase long-standing principles of comity and accommodation in international maritime trade." *Windward Shipping,* 42 LW, 4237. The rationale, references, and much of the language in *Benz* through *Windward Shipping* is equally pertinent to extra-territorial application of the Jones Act. But the consistent start made in *Lauritzen* could not be perpetuated by a minority in *Rhoditis.*

Contrary legislative and executive actions abound. For instance, under 46 U.S.C. 835, a U.S. flag shipowner can transfer to foreign flag with Maritime Administration consent, long encouraged with tacit Congressional approval for transfers to Panama, Liberia, and Honduras so as to assure an adequate merchant fleet under effective U.S. control. Note, 60 Col. L. Rev., 712-713; Note, 69 Yale L.J., 501. By virtue of 46 U.S.C. 1282, 1283(a), 46 C.F.R. 308.1, our Government provides essential war risk coverage to "Panlibhon" vessels if U.S. owned either directly or through a foreign corporation.

In 1961 Congress created the Overseas Private Investment Corporation to encourage and facilitate investment of U.S. private capital in friendly developing nations, 22 U.S.C. 2191, and we have OPIC guarantee agreements with both Liberia and Honduras. OPIC Incentive Handbook for Investment Financing, Appendix 2. In the Foreword to OPIC's 1972 Annual Report, the President wrote:

> "The major contribution that U.S. private investments overseas make to this country's economy are also a great credit to your organization. These investments have contributed nearly $8 billion to the U.S. balance of payments, have created more than 600,000 jobs in this country, and have helped assure our continued supply of important raw materials. Continued growth of the country's overseas investment is essential."

Judicial discouragement of Maritime Administration facilitated U.S. ownership and operation of "Panlibhon" ships is made more incongrous by Congressionally encouraged OPIC facilitated U.S. ownership and operation of "Panlibhon" chemical plants, fiberglass manufacturers, hog

farms, hotels, merchant banks, power stations, etc., etc. American foreign investment has been additionally promoted by E.O. 11766 (1/31/74) reduction of the I.R.C. § 4911 interest equalization tax rate to zero.

The indelible futility of attempting to make the Jones Act an economic weapon is itself indicative of judicial misapplication. As the Court noted in *Windward Shipping,* 42 LW, 4235, 4238, because American seamen's wages are 2½-4 times those of foreign seamen, 95% of U.S. exports are carried by foreign ships. Further decline in U.S. merchant flag employment is forecast. 1972-1973 Occupational Outlook Handbook, U.S. Dept. of Labor Bull. 1700, p. 742. The economic realities are reflected in three companion articles in the March 29, 1974 Journal of Commerce, vol. 319, no. 23,166, p. 3, col. 4, p. 24, col. 6, 8. The U.S. Department of Commerce, Bureau of Economic Analysis forecast BEA 74-21 (3/28/74) that "Expenditures for property, plant, and equipment by majority-owned foreign affiliates of U.S. companies are expected to rise 18 percent in 1974, to $23.8 billion". The Marine Index Bureau's Statistical Analysis No. 58 (3/27/74) reports that "1973 witnessed a drop in the average number of seafaring jobs on U.S. commercial ships 1000 tons and over to the lowest point in the past half century. From a World War II peak of 161,000 in 1945, the all-time low average of 26,300 was reached in the past year." The U.S. Army Corps of Engineers issued a March 18, 1974 news release that "Waterborne commerce of the United States in the calendar year 1973 totalled 1,737,000,000 tons, a new all-time high * * * . By far, the greatest advances were realized in foreign traffic. In this trade, imports registered an increase of 17.2 percent while foreign export shipments surged upward 20 percent."

The writ should be granted to reconsider the rationale of *Rhoditis* and its progeny. *Cf., Afroyim* v. *Rusk,* 387 U.S. 253, 256 (1967); *Marchetti* v. *United States,* 390 U.S. 39, 41 (1968). Although the judgment below is non-final, the important question presented is certainly "fundamental to the further conduct of the case". *U.S.* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945); *Gillespie* v. *U.S. Steel Corp.,* 379 U.S. 148, 153-154 (1964), another Jones Act case. While the court below mentioned 40% voyages to/from U.S. ports as a makeweight, it held that "the most important [contact] is that all of the stock of all the defendants was owned by Americans", to which it added U.S. operations base and U.S. corporate officers.

Conclusion

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

WILLIAM M. KIMBALL
Counsel for Petitioner

New York, New York
April 19, 1974.

APPENDICES

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 48—September Term, 1973.

(Entered January 21, 1974.)

Docket No. 73-1184

ELENA JEREZANO MONCADA, as Personal Representative of the Estate of Arturo Moncada, Deceased,

Plaintiff-Appellant,

v.

LEMURIA SHIPPING CORP., S.A. LUMBER & SHIPPING CORP., and EKBERG SHIPPING CORP.,

Defendants-Appellees.

Before:

MOORE, HAYS and FEINBERG,

C.JJ.

Appeal from orders of the United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *Judge,* dismissing plaintiff's claims.

Affirmed in part, reversed in part, and remanded.

HAYS, *Circuit Judge*:

Arturo Moncada was a Honduran seaman employed aboard the S.S. Ekberg from June 12, 1968 until his death on September 27, 1968. Moncada fell ill and died aboard ship at Maceio, Brazil. The medical examiner determined the cause of death to be severe edema of the lungs (pulmonary congestion). Alleging negligence by the master of the ship in failing to call a doctor rapidly, the widow of the decedent brought this suit under the Jones Act and general maritime law against Ekberg Shipping Corp. (which owned the vessel and employed the crew), Lemuria Shipping Corp. (the chartering broker for the vessel), and S.A. Lumber & Shipping Co. (which managed the ship).

The district court held that the American contacts were insufficient to establish Jones Act jurisdiction. It therefore dismissed the Jones Act claim and discharged the jury to which plaintiff would have been entitled under the Jones Act. Proceeding to trial without a jury, the judge found for defendants. We reverse as to defendant Ekberg Shipping Corp., but affirm as to the other defendants.

The literal terms of the Jones Act do not require that either the parties or the injury have any connection with the United States.[1] However, the courts have long recognized that Jones Act jurisdiction is subject to some limitations. See *Lauritzen* v. *Larsen*, 345 U.S. 571, 576-77 (1953). In *Bartholomew* v. *Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), cert. denied, 359 U.S. 1000 (1959), we held that Jones Act jurisdiction exists only where there are substantial contacts between the transaction involved in the case

---

[1] The Jones Act, 46 U.S.C. §688 (1970), reads as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . ."

and the United States, with substantiality to be determined on an absolute scale and not by comparing or balancing the presence of certain contacts with the absence of others. Id. at 440-41. No subsequent decision of this court or of the Supreme Court has undercut the holding of *Bartholomew*. Indeed, in *Hellenic Lines Ltd.* v. *Rhoditis,* 398 U.S. 306, 309 n.4 (1970), the Supreme Court expressly adopted the test enunciated by Judge Medina in *Bartholomew*. Whether, as appellant suggests, the dissent in *Rhoditis* might now win the support of a majority of the Supreme Court is not for us to decide.

In determining whether the contacts in a given case are "substantial" the courts have given consideration to the significance attaching to specific contacts. In *Lauritzen* v. *Larsen,* supra, the Supreme Court enumerated the following contacts as worthy of consideration: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured party; (4) the allegiance of the shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum. 345 U.S. at 583-92. In *Rhoditis* the Court held that this list is not exhaustive. It decided that the shipowner's base of operations is also an important contact and that "there may well be others." 398 U.S. at 309. Thus we must consider each factor and its importance in the context of this case.

The majority of the contacts enumerated in *Lauritzen* seem to favor the defendants in this case. But as we have indicated above, our task is not to weigh or balance present against absent contacts, but merely to determine whether the contacts which are present are substantial. Thus the Court in *Rhoditis* found for the plaintiff although the majority of contacts favored the defendant. Moreover, many of the factors here favoring defendants have been declared

insignificant in *Lauritzen* and succeeding cases. In *Lauritzen* the Court conceded that traditional maritime law "gives cardinal importance to the law of the flag," 345 U.S. at 584, but noted that in light of resort of American shipowners to foreign flags of convenience, courts have often ignored the law of the flag in order "to enforce against American shipowners the obligations which our law places upon them." Id. at 587. Other contacts to which the courts have paid little attention include the place of injury, *Lauritzen,* supra, at 583; the place where the contract was made, *Lauritzen,* supra, at 588-89; *Southern Cross Steamship Co.* v. *Firipis,* 285 F.2d 651, 653 (4th Cir. 1960), cert. denied, 365 U.S. 869 (1961); and the inaccessibility of a foreign forum, *Lauritzen,* supra, at 589-91; *Southern Cross Steamship Co.* v. *Firipis,* supra, at 653.

Of the contacts favoring the plaintiff in the present case, the most important is that all of the stock of all the defendants was owned by Americans. In *Bartholomew* we suggested that American ownership alone suffices to establish Jones Act jurisdiction. 263 F.2d at 443 n.4. That position was expressly adopted by then District Judge Irving R. Kaufman in *Bobolakis* v. *Compania Panamena Maritima San Gerassimo, S.A.,* 168 F. Supp. 236 (S.D.N.Y. 1958). However, we need not rely upon this ground alone, for there are here additional contacts which, when added to American ownership, make the sum of the contacts substantial. The Supreme Court in *Rhoditis,* approving *Pavlou* v. *Ocean Traders Marine Corp.,* 211 F. Supp. 320, 325 (S.D.N.Y. 1962), held that the shipowner's base of operations is also significant. 398 U.S. at 309. The location of the managing and chartering agents for the vessel are also entitled to consideration. See *Bartholomew,* 263 F.2d at 441. In the instant case all defendants have their base of operations in this country and the managing and chartering

of the vessel were conducted from this country. In addition to those contacts all officers of the defendants are American. See *Bartholomew*, 263 F.2d at 441. Approximately 40% of the vessel's voyages began or ended in American ports. See *Rhoditis*, 398 U.S. at 310.

In light of the precedents construing the Jones Act and of the purposes of Congress in enacting the Jones Act we hold that the contacts between this transaction and the United States are substantial and that Jones Act jurisdiction exists. The decision of the district court must be reversed. Because plaintiff was entitled to have her Jones Act claim tried to a jury, she was also entitled to a jury trial on her claims under general maritime law. *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963); *Harney* v. *William M. Moore Building Corp.*, 359 F.2d 649, 656 (2d Cir. 1966). Thus plaintiff will also have a right to a jury trial of these claims on remand.

Although there were sufficient contacts to establish Jones Act jurisdiction the district court properly dismissed the actions against defendants Lumber and Lemuria on the ground that they neither owned the S.S. Ekberg nor were the employers of the deceased seaman. Thus the dismissal is affirmed as to these defendants. *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384-85 (1959); *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949); *Fitzgerald* v. *A.L. Burbank & Co.*, 451 F.2d 670 (2d Cir. 1971); *Dassigienis* v. *Cosmos Carrier & Trading Corp.*, 442 F.2d 1016 (2d Cir. 1971).

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of January one thousand nine hundred and seventy-four.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,

Circuit Judges.

73-1184

ELENA JEREZANO MONCADA, as Personal Representative of the Estate of Arturo Moncada, Deceased,

Plaintiff-Appellant,

v.

LEMURIA SHIPPING CORPORATION, S.A. LUMBER & SHIPPING CO., INC., and EKBERG SHIPPING CORP.,

Defendants,

EKBERG SHIPPING CORP.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and reversed in part and that the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro
Clerk

by Vincent A. Carlin,
Chief Deputy Clerk

MAY 21
MICHAEL RODAK, J

SUPREME COURT of the UNITED STATES

October Term, 1973

No. 73-1581

Ekberg Shipping Corp.,

Petitioner,

-against-

Elena Jerezano Moncada,

Respondent.

OPPOSING BRIEF OF THE RESPONDENT ELENA JEREZANO MONCADA TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thomas M. Breen
Attorney for Respondent
160 Broadway
New York, New York 10038

INDEX

	Page
Question Presented	1
Statutes Involved	2
Statement of the Case	4
Reasons for Denying the Writ	10
Point I - The United States Courts Have Followed Congressional Policy Consistently in Holding That the Jones Act 46 U.S.C.A. 688 Applies to Foreign-Flag Vessels When There Are Substantial Contacts With the United States	10
Point II - When the Courts Have Consistently Applied Congressional Policy on the Jones Act for Many Years, No Good Reason Exists to Re-examine These Decisions and to Allow Foreign-Flag American Citizen Shipowners to Escape United States Taxes Pay Lower Wages and Ignore United States Ship Safety Standards	18
Conclusion	22

TABLE OF AUTHORITIES

Cases	Page
Afroyim v. Rusk, 387 U.S. 253 (1967)	19
Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437 (2 Cir. 1959) cert. den. 359 U.S. 1000 (1959)	8,15-16
Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957)	13
Bobolakis V. Compania Panamena Maritima San Gerassimo S.A. 168 F. Supp. 236 (S.D.N.Y.1958)	19
Carroll v. United States, 133 F.2d 690 (2 Cir. 1943)	21
Gerradin v. United Fruit Co. 60 F.2d 927 (2 Cir. 1932)	13-14,18,21
Groves v. Universe Tankships, Inc. 308 F. Supp. 826 (S.D.N.Y.1970)	21
Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306(1970)	8,11,12,13,15,21
Iroquois, The 194 U.S. 241, 24 S. Ct. 640	9
Lauritzen v. Larsen, 345 U.S. 571 (1953)	12,21

	Page
Lopes v. S.S. Ocean Daphne, 337 F. 2d 777 (4 Cir. 1964)	18
Marchetti v. United States, 390 U.S. 39 (1968)	19
McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963)	12,13
Monteiro v. Sociedad Maritima San Nicolas, S.A. 280 F. 2d 568 (2 Cir. 1960)	19-20
Pandazopoulos v. Universal Cruise Line, Inc., 365 F. Supp. 208 (S.D.N.Y. 1973)	19
Pavlou v. Ocean Traders Marine Corporation, 211 F. Supp. 320 (S.D.N.Y. 1962)	21
Philips v. Star Overall Dry Cleaning Co. Inc., 55 F. Supp. 238 (S.D.N.Y. 1944) affirmed 149 F. 2d 417 (2 Cir. 1945)	17
Voyiatzis v. National Shipping and Trading Corporation, 199 F. Supp. 920 (S.D.N.Y. 1961)	21
Windward Shipping (London) Ltd. v. American Radio Ass'n - U.S. - 42 LW 4234 (2/19/74)	15

Page

Zielinski v. Empresa Hondurena de Vapores, 113 F.Supp. 93 (S.D.N.Y. 1953) 21

Statutes

Jones Act (46 U.S.C.A. 688) 2

Liberian Maritime Law of Liberian Code of Laws Title 22, Section 30 2,9

Rules

Rules of Civil Procedure for the United States District Courts
Rule 38(d) 3
Rule 39(a) 3

Other

Webster's Third New International Dictionary 17

In The

: COURT of the UNITED STATES

October Term, 1973

No. 73-1581

Ekberg Shipping Corp.,

Petitioner,

-against-

Elena Jerezano Moncada,

Respondent.

NG BRIEF OF THE RESPONDENT
JEREZANO MONCADA TO THE
ON FOR A WRIT OF CERTIORARI
E UNITED STATES COURT OF
LS FOR THE SECOND CIRCUIT

ezano Moncada, respondent, prays that
Court of the United States refuse to
of certiorari to review the judgment of
ates Court of Appeals for the Second
red in this action on January 21st, 1974.

Question Presented

ondent disagrees with the question pre-
petitioner's brief. The respondent
he proper question is:

ng out Congressional policies and pur-
the Court of Appeals correct in deciding
s were substantial between transactions
is case and the United States so that the
:6 U.S.C.A 688) applied?

Statutes Involved

The text of the Jones Act (46 U.S.C.A. 688) follows:

"Section 688. Recovery for injury to or death of a seaman

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, Section 20, 38 Stat. 1185; June 5, 1920, c. 250, Section 33, 41 Stat. 1007."

The Liberian Maritime Law of the Liberian Code of Laws states as follows:

"Adoption of General American Maritime Law. Insofar as it does not conflict with any other provisions of this Title, the non-statutory general Maritime Law of the United States of America is hereby declared to be and is hereby adopted as the general Maritime Law of the Republic of Liberia." Title 22, Section 30.

Rules 38(d) and 39(a) of the Rules of Civil Procedure for the United States District Courts read as follows:

"Rule 38. Jury Trial of Right.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of a trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties."

"Rule 39. Trial by Jury or by the Court.

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by a jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury, or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Statement Of The Case

The respondent can agree with some of the facts enunciated in the petitoner's statement but desires to aver the following as the facts of the case.

The plaintiff, Elena Jerezano Moncada, is the 53 year old widow of the decedent Arturo Moncada. In addition to his widow, the decedent left four minor children who were 17, 16, 12 and 10 at the time of his death. Under the laws of Honduras, of which both the plaintiff and decedent were citizens, the widow is the personal representative of her deceased husband and entitled to bring an action to recover damages for the personal injuries suffered by her husband and for his death both under the Jones Act and the General Maritime Law. The decedent was the sole support of his widow and children.

The decedent Arturo Moncada was an able bodied seaman employed between June 12, 1968 and September 27, 1968 aboard the S.S. Ekberg. His earnings were $90.00 per month plus 40¢ an hour overtime and found. The defendant Ekberg Shipping Corp., a Liberian Corporation, admits ownership of the vessel and employment of the decedent while he served aboard the S.S. Ekberg (40a). The principal business of the S.A. Lumber & Shipping Co., Inc., a New York Corporation with an office in New York City, was to manage and operate the S.S. Ekberg (5a, 17a and 39a). The Lemuria Shipping Corporation, a New York corporation with an office in New York City was the

chartering broker of the vessel (4a, 19a and 39a). The base of business operations of the S. S. Ekberg was in New York (48a).

So far as a contract of employment is concerned in the case on appeal - the following is from the cross examination of Mr. Chimes - the principal owner of the three defendants (49a):

Question - "Do you have a copy of the contract that you had with Sindimar? "

Answer - "Not with me, but there should be one, but I am not certain where it is."

The widow stated on her examination that she received no money from the shipowner except the remaining wages earned by the decedent while he was still alive.

Witness Aurelio Juarez, a crew member of the S. S. Ekberg testified at the trial on behalf of the plaintiff. He stated that at about ten o'clock in the morning of September 27th, 1968, when the vessel was docked at Maceio, Brazil, the decedent Arturo Moncada became ill. He was weak, sweating, had a pallor and suffered difficulty in breathing. Mr. Juarez stated that Chief Mate Gomez and another seaman removed Mr. Moncada to his cabin during the morning of September 27, 1968.

At noontime Mr. Juarez and two other seamen told the Master about Moncada's worsening illness and they requested medical treatment for the sick seaman. Again at three o'clock on the same afternoon witness Juarez reported to the Captain about

the physical condition of Mr. Moncada. The Master replied that he had no money to get medical attention for Mr. Moncada and that he would not call a doctor. About 5:00 P.M. Juarez went ashore and called a doctor. Then the witness stated that a doctor from Maceio came aboard the vessel with a nurse about 6:30 P.M. When the doctor examined Moncada at that time Moncada was declared dead.

The body of the decedent was taken to a morgue and the medical examiner listed the causes of death as pulmonary congestion and acute edema.

The plaintiff claims that prompt medical attention would have saved the decedent's life. The plaintiff introduced expert medical testimony at the trial. This doctor testified that if the doctor in Maceio had given the decedent digitalis, he would not have died. If a doctor had been summoned around noontime or during the afternoon, the injection of digitalis would have been effective.

A jury of six people was empaneled in this action. Mrs. Moncada, the personal representative, was the only witness to testify before the jury. In the jury's absence, the defendant called George J. Chimes. Mr. Chimes stated that he had an ownership or principal interest in the three corporations (38a). Mr. Chimes testified that all three corporations were substantially American owned companies (38a). He further stated that the majority of the crew were Honduran and the officers of the crew were Spanish (43a, 44a). Also, that the business reason for employing the foreign crew was that it was more economical (44a). During the time the decedent was on the ship, it flew

the Liberian flag.

Mr. Chimes admitted on cross examination that the business of the S.S. Ekberg was directed from New York and that the base of business operations was in New York (48a). Further, Mr. Chimes declared that the three companies had their books and records as well as their bank accounts in New York (48a). In addition, the chartering of the vessel was arranged in New York (49a).

Mr. Chimes, as stated above, had a principal interest in the three defendants (38a). After his testimony and colloquy with counsel the Court stated that there were insufficient American contacts to warrant application of the Jones Act (46 U.S.C.A. 688). The Court excused the jury over the objection of plaintiff's counsel and proceeded under the General Maritime Law without a jury (52a-54a).

When the trial continued, the plaintiff called as witnesses, Aurelio Juarez, a crew member of the S.S. Ekberg, Teobaldo Enamorado, a lawyer and an expert on Honduran Law and Dr. Robert Tuby, a medical expert. After the defendant called Captain Gaurrochena, master of the vessel, the trial concluded. At that time, the Court requested proposed findings of fact and conclusions of law from both parties and stated that it would call the attorneys for a summation.

On November 29th, 1972, the Court issued findings of fact and conclusions of law dismissing

the plaintiff's complaint. These were filed on November 30, 1972. The attorneys were not called back for summation. (Findings of Fact 108a - 111a) Conclusions of Law 111a - 113a).

REJECTING THE JURY TRIAL

The complaint pleaded separate causes of action under both the Jones Act and General Maritime Law. Substantial contacts were proven within the meaning of Hellenic Lines Ltd. v. Rhoditis 398 U.S. 306, 90 S. Ct. 1731 (1970) and Bartholomew v. Universe Tankships, Inc. 263 F. 2d 437 (2 Cir. 1959) cert. den 395 U.S. 1000, 79 S. Ct. 1138 (1959). These contacts entitled the plaintiff to recover under the Jones Act. These contacts consisted of:

1. All of the shareholders of the defendants were American (23a).

2. All of the officers of the defendants were American (23a).

3. Between May, 1967 and November, 1968, 40% of the voyages of the vessel were either to or from some United States port and approximately 60% of the voyages were entirely foreign (25a).

4. Direction of the S. S. Ekberg was from New York and the base of business operations of the S. S. Ekberg was in New York (48a).

5. Bank accounts, books and records of the defendants were in New York (48a-49a).

6. Chartering of the vessel was arranged in New York (49a).

7. The Lemuria Shipping Corporation, a New York Corporation, was the chartering broker for the vessel (4a, 17a and 39a).

8. Another New York Corporation - S. A. Lumber & Shipping Co., Inc., managed and operated the S. S. Ekberg (5a, 17a and 39a).

It is relevant that the vessel flew the Liberian flag. Title 22, Section 30 - The Liberian Maritime Law of the Liberian Code of Laws states as follows:

"Adoption of General American Maritime Law. -Insofar as it does not conflict with any other provisions of this Title, the non-statutory general Maritime Law of the United States of America is hereby declared to be and is hereby adopted as the general Maritime Law of the Republic of Liberia."

Under the non-statutory General Maritime Law of the United States the shipowner is required to provide such medical care and attention as the situation requires. The shipowner is liable for failure to provide medical treatment regardless of negligence. The Iroquois, 194 U.S. 241, 24 S. Ct. 640.

Reasons for Denying the Writ

Point I

THE UNITED STATES COURTS HAVE FOLLOWED CONGRESSIONAL POLICY CONSISTENTLY IN HOLDING THAT THE JONES ACT 46 U.S.C.A. 688 APPLIES TO FOREIGN-FLAG VESSELS WHEN THERE ARE SUBSTANTIAL CONTACTS WITH THE UNITED STATES

There are three reasons for the existence of flags of convenience in competition with American flag vessels:

1. Escape from taxes.

2. Lower wages - the decedent here made $90.00 per month plus 40¢ per hour overtime.

3. High safety standards for United States vessels can be ignored.

Congressional policy was expressly made to promote the American Merchant Marine. The petitioner recognizes the law that has been applied in the furthering of the policy but would like the law to be otherwise.

The existing interpretation of the Jones Act reflects Congressional policy to equalize conditions between flags of convenience and American flag vessels.

In Hellenic Lines Ltd. v. Rhoditis 398 U.S. 306, 90 S. Ct. 1731 (1970) the Court states in its opinion:

> "Pericles became a lawful permanent resident alien in 1952. We extend to such an alien the same constitutional protection of due process that we accord citizens. Chew vs. Colding, 344 U.S. 590, 596, 1953 A.M.C. 250, 255. The injury occurred here. The forum is a United States Court. Pericles' base of operations is New York. The Hellenic Hero was not a casual visitor; rather, it and its sister ships were earning income from cargo originating or terminating here. We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country, may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibilities of a Jones Act "employer". The flag, the nationality of the seaman, the fact that this employment contract was Greek, and that he might be compensated there are in the totality of the circumstances of this case minor weights in the scales compared with the substantial and continuing contacts which this alien owner has with this country. If, as stated in Bartholomew vs. Universe Tankships, Inc. 1959 A.M.C. 273, 263 F. (2d) 437, the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor,

compared with the real nature of the operational contacts that this ship and this owner have with the United States. By that test the Court of Appeals was clearly right in holding that petitioner was an "employer" under the Jones Act. Affirmed."

The prevailing opinion is between pages 307 and 310; the dissenting opinion starts at page 311.

The Rhoditis case followed the opinion in the Lauritzen case decided in the United States Supreme Court in 1953, as the following quotation shows (Lauritzen v. Larsen 345 U.S. 571, 73 S. Ct. 921) (1953):

> "But it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American Shipowners the obligations which our law places upon them." 345 U.S., p. 587, 73 S. Ct., p. 931.

In McCulloch v. Sociedad Nacional, 372 U.S. 10, 83 S. Ct. 671, the Supreme Court followed the Congressional policy in declaring that the National Labor Relations Act existed for American working men and their employers. The Supreme Court refused to consider contacts on the applicability

of this legislation. On page 19, footnote 9 - there is this reference to the Jones Act and contacts:

> "9. Our conclusion does not foreclose such a procedure in different contexts, such as the Jones Act, 46 U.S.C. Section 688, where the pervasive regulation of the internal order of a ship may not be present." ***

The McCulloch case was decided in 1963 - seven years before the Rhoditis opinion was handed down.

In Benz v. Naviera Compania Hidalgo, 353 U.S. 138 (1959) the Supreme Court reached the same conclusion as in the McCulloch case about the National Labor Relations Act applying to American working men and their employers. The same opinion notes a different Congressional policy on wage statutes that refer to foreign seamen in United States Ports. (Page 144 of the opinion).

In Gerradin v. United Fruit Co., 60 F. 2d 927, 1932 the Court made the following statement about the effort of American owners to escape the liability of the Jones Act and defeat Congressional policy.

> "There can be no doubt about the power of Congress to impose liability upon its own citizens for acts done on the high seas or at other places outside its territorial jurisdiction. American Banana Co. v. United Fruit Co., 213 U.S. at page 356, 29 S. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047. Section 33 of

> of the Merchant Marine Act (46 USCA Section 688) has done this in the case of American citizens who own ships on which seamen are injured through their negligence, and it seems but a slight disregard of the symbol of foreign registry to apply an ordinary rule of torts to a shipowner who bears such an illusory shield. The question is not one of power, but of the meaning and scope of Rev. St. Section 4612."

The Gerradin opinion goes on to distinguish the internal discipline of a vessel from the right of a seaman to sue under the Jones Act. The Court stated at page 930:

> "This article relates only to matters of "'internal order"' or "'discipline'" on board a vessel of Honduran registry as to which the treaty might prevail even in an American port, but it does not affect rights of seamen to recover damages for negligence against an American citizen who owns the vessel. While section 33 literally covers even these matters of internal discipline, the subsequent treaty might require our courts to abstain from action as to them where there was the formal barrier of registry between the shipowner and his antagonist. Uravic v. Jarka, 282 U.S. at page 240, 51 S. Ct. 111, 75 L. Ed. 312. It does not affect the present action."

The judgment for the plaintiff seaman under the Jones Act was affirmed. (60 F. 2d 927)(2 Cir. 1932).

The case of Windward (London) Ltd. v. American Radio Ass'n - U.S. - , 42 LW 4234 (2/19/74) interpreted the Labor Management Relations Act but also referred to the Jones Act at footnote 14 on page 4237:

> "14 *** Although analysis of the Jones Act there obviously involved different considerations from analysis of the Labor Management Relations Act here, it is interested to note that some arguments at least are common to both cases." ***

This footnote shows the different interpretation given to Congressional policy in the two statutes - Labor Management Relations Act and the Jones Act.

Bartholomew v. Universe Tankships, Inc. 263 F. 2d 437. (2 Cir. 1959).

This case was cited in Rhoditis supra; Judge Medina defined substantial contacts at page 440 of the Bartholomew opinion:

> "(1) Hence it must be said that in a particular case something between minimal and preponderant contacts is necessary if the Jones Act is to be applied. Thus we conclude that the test is that "'substantial'" contacts are necessary. And while as indicated supra one contact such as the fact that the vessel flies the American flag may alone be sufficient, this is no more than to say that in such a case the contact is so obviously substantial as to render unnecessary a further

probing into the facts.

> Some of the advantages of this simple formula are that it states a rational method of ascertaining the congressional intent, and that in its application there is no occasion to consider and "'weigh'" the contacts that do not exist, nor to go through any process of balancing one set of facts that are present against another set of facts that are absent, without any sure guide as to how the balancing is to be done. Accordingly, the decisional process of arriving at a conclusion on the subject of the application of the Jones Act involves the ascertainment of the facts or groups of facts which constitute contacts between the transaction involved in the case and the United States, and then deciding whether or not they are substantial. Thus each factor is to be "'weighed'" and "'evaluated'" only to the end that, after each factor has been given consideration, a rational and satisfactory conclusion may be arrived at on the question of whether all the factors present add up to the necessary substantiality. Moreover, each factor, or contact, or group of facts must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act. We shall now proceed to apply these principles to the case before us."

Other Courts have defined the meaning of substantiality under different statutes. For example, the Fair Labor Standards Act of 1938, Section 3(j), 29 U.S.C.A. Section 203(j) was interpreted in the

case of Philips v. Star Overall Dry Cleaning Co., Inc. 55 F. Supp. 238, S. D. N. Y. 1944. The Fair Labor Standards Act was held applicable although only 4% of the Laundry Corporation's production was regularly and continuously in intrastate commerce. At page 239 of the opinion the Court stated that the "plaintiffs" were, therefore, substantially engaged in the production of goods for commerce. This degree of work is much less than the substantial contacts that the steamship company and its affiliates had in this case.

The Philips judgment was affirmed in the Court of Appeals, Second Circuit. Opinion reported at 149 F. 2d 417 (2 Cir. 1945).

In Webster's Third New International dictionary, G. & C. Merriam Company, Publishers, Springfield, Massachusetts (1964) the word "substantial" is defined as follows at page 2280:***

The first "substantial" c: being of moment; IMPORTANT, ESSENTIAL.

The second "substantial" c: something of moment: an important or material matter, thing, or part.

Point II

WHEN THE COURTS HAVE CONSISTENTLY APPLIED CONGRESSIONAL POLICY ON THE JONES ACT FOR MANY YEARS, NO GOOD REASON EXISTS TO RE-EXAMINE THESE DECISIONS AND TO ALLOW FOREIGN-FLAG AMERICAN CITIZEN SHIPOWNERS TO ESCAPE UNITED STATES TAXES, PAY LOWER WAGES AND IGNORE UNITED STATES SHIP SAFETY STANDARDS.

Dating from Gerradin supra, which was decided in 1932, the courts have drawn a line between Congressional policy on the Jones Act and interference with the internal discipline of a foreign-flag vessel. Please see page 14 of this brief.

Lopes v. S.S. Ocean Daphne, 337 F. 2d 777, (4 Cir. 1964).

The Court refused to assess wage penalties against American owners of foreign-flag ships. The Court states this at page 780 of the opinion:

> "***See also Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953), and footnote 9 in McCulloch, discussing the application of the Jones Act, 46 U.S.C.A. Section 688, and distinguishing those cases on the ground that the application of that Act does not affect " 'the pervasive regulation of the internal order of a ship.' "

The brief for the petitioner cites Afroyim v. Rusk, 387 U.S. 253(1967) and Marchetti v. United States, 390 U.S. 39 (1968) as examples of reversal of prior rulings.

The opinion of the Court in the Afroyim case indicates that a prior decision had been a source of controversy and confusion. (Page 255). The Marchetti case concerned a defendant's assertion of the privilege against self-incrimination - a case completely different from a death case brought by a seaman's widow.

One of the most recent cases that considered the application of the Jones Act to a foreign seaman on a foreign-flag vessel is Pandazopoulos v. Universal Cruise Line, Inc., 365 F. Supp. 208. The Court stated at page 210 after quoting the Bartholomew case:

> "Id. at 441 (quoted with approval in Rhoditis, supra, 398 U.S. at 309, f.n. 4, 90 S. Ct. 1731). It is against this background of well settled precedent that the instant case must be considered."

In Bobolakis v. Compania Panamena Maritima San Gerassimo, 168 F. Supp. 236 (S.D.N.Y.1958) the Court disapproved the efforts of a shipowner to pile one corporate layer on top of another to secrete the actual ownership of the vessel.

With reference to wage statutes, the Court in Monteiro v. Sociadad Maritima San Nicolas, S.A., 280 F. 2d 568, made this comment at page 573:

The aim of Congress in enacting the Jones Act was to promote the American Merchant Marine. This purpose has been followed in these cases which gave the seaman or his survivor the right to proceed under the Jones Act:

Carroll v. United States, 133 F. 2d 690, (2 Cir. 1943).

Zielinski v. Empresa Hondurena Vapores, 113 F. Supp 93 (S. D. N. Y. 1953).

Voyiatzis v. National Shipping & Trading Corporation 199 F. Supp 920 (S. D. N. Y. 1961).

Groves v. Universe Tankships, Inc. 308 F. Supp. 826 (S. D. N. Y. 1970). (Decedent, a British seaman joined the vessel in Port of Spain, Trinidad and was killed in Japan).

Pavlou v. Ocean Traders Marine Corporation, 211 F. Supp. 320 (S. D. N. Y. 1962). (Cited favorably in Rhoditis, supra).

The Court of Appeals remanded this case for a new trial under the Jones Act and the General Maritime Law. The petition refers to the Jones Act only and consequently is in the nature of an interlocutory appeal.

The Gerradin case, supra, was decided in 1932, the Lauritzen case, supra, in 1953 and the Rhoditis case, supra, in 1970. The courts have followed Congressional policy and intent in applying the Jones Act to American owners of foreign

flag vessels when sufficient contacts existed. The contacts in this case, which are sketched at page 8 of this brief, indicate that the Jones Act governs the case at bar. The petitioner has shown no valid reason why this well settled precedent should be disturbed.

Conclusion

For the reasons set out above the petition for certiorari should be denied.

Respectfully submitted,

Thomas M. Breen
Attorney for Respondent

New York, New York
May 1974